IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 21ST JUNE 2007 / 31ST JYAISHTA 1929

CMA.No. 243 of 2002()

AS.78/1999 of PRINCIPAL SUB COURT,PARAVUR
OS.46/1990 of MUNSIFF COURT, PERUMBAVOOR
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APPELLANT: 1ST DEFENDASNT/1ST RESPONDENT/APPELLANT:

T.M. ABDUL MAJEED, ADVOCATE,
C.C.2/392, FORT COCHIN, COCHIN-682 001.

BY ADV. SRI.V.V.ASOKAN
SRI.PAUL ABRAHAM VAKKANAL

RESPONDENTS: PLAINTIFFS 1 AND 2, DEFENDANTS 2 TO 5 :
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1. NABEESA, W/O. SRI. SIDDIQUE,
PUNNAKKAL HOUSE, KANJIRAKKAD KARA,
PERUMBAVOOR VILLAGE.

2. PAREED, S/O. SRI. SYED ALI,
NEDUNGATTUKUDI, VALLOM KARA,
PRUMBAVOOR VILLAGE.

3. RAHIM, S/O. SRI. MOHAMMED,
PALATHINKAL, PUTHENPURAYIL,
VALLAM KARA, PERUMBAVOOR VILLAGE.

4. PARIJATHAMMA, D/O. SMT. RATHANAMMA,
RAMAMANGALATH HOUSE, PERUMBAVOOR KARA,
PERUMBAVOOR VILLAGE.

5. MAKKAR PILLA, S/O. SRI. KOYA,
PERUNGATTU, PUTHENPURAYIL, KADAVOOR KARA,
KADAVOOR VILLAGE, KOTHAMANGALAM TALUK.

6. MEERA PILLA, S/O. SRI. PAREED,
CHERUVALLIKUDI, KANJIRAKKAD KARA,
PERUMBAVOOR VILLAGE.

7. KUNJU MOHAMMED, S/O. SRI. ALI,
KARAVATHUKUDI HOUSE, KANJIRAKADU KARA,
PERUMBAVOOR VILLAGE.

BY ADV. SRI.M.A.ABDUL HAKHIM
SRI.ANIL K.MOHAMMED

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 21/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

C.M.A.No. 243 of 2002

Dated this the 21st June, 2007.

J U D G M E N T

The first respondent in A.S.No.78/1999, on the file of the Principal Sub Court, N.Paravur, is the appellant. This Civil Miscellaneous Appeal is filed challenging the judgment of the Lower Appellate Court, remanding the suit for fresh disposal, in accordance with the law.

2. The short facts necessary for disposal of the C.M.Appeal are as follows. Respondents 1 and 2 filed the suit for declaration of title, possession, and consequential injunction, alleging that suit property is originally belonging to the third respondent , second defendant. It was further averred that on 27.10.1981, the second defendant borrowed an amount of Rs.15,000/= from the 3rd defendant, 4th respondent herein. The 3rd defendant filed Pauper O.P.No.4/1984 on 7.3.1984, and sought attachment of the property. The said Original Petition was later on converted as O.S.No.521 of 1984. Subsequently, the matter was compromised and Ext.A2 decree was passed. It was averred that under the decree, the second

defendant transferred the suit property to the 3rd defendant, and the 3rd defendant became the owner of the property. The 3rd defendant subsequently executed a sale deed in favour of the plaintiffs and others. It was contented that in execution of the decree passed in O.S.No.149/1983, the property was sold and the first defendant purchased the property in court auction, and took delivery of the property. The first defendant did not produce any encumbrance certificate and did not follow the provisions of Civil Rules of Practice. The Court sale in respect of the first defendant was null and void, and not binding upon the plaintiffs.

2. The learned counsel appearing for the appellant has argued that the suit is barred by limitation and is bad for mis-joinder of necessary parties. He further submits that the suit is also barred by resjudicata. It is argued that the second respondent borrowed an amount of Rs.30,000/= from him and created an equitable mortgage, depositing his title deeds. Appellant filed O.S.No.149/1983 and in execution of the decree passed in the suit, the property was sold and purchased by him. It is further contented that O.S.No.521/1984 was filed by the 3rd defendant, 4th respondent, in collusion with the first defendant, appellant, to defraud him. He also submitted that the

alleged transfer in favour of the first respondent, plaintiff, is hit by lis pendens, and the first respondent has got no locus standi to challenge the execution proceedings. The first respondent, plaintiff, obstructed the delivery, and filed E.A.No. 437 (a) 87, and the same was dismissed and decree was executed. So, the suit is barred by the principles of Resjudicata also. The learned counsel has also argued that the Trial Court has no pecuniary jurisdiction to try this suit. When the suit came up for trial, both sides agreed that the question of pecuniary jurisdiction need not be considered, and the Trial Court has got jurisdiction to entertain the suit. It was found that the suit is hit by lis pendens, and hence, the plaintiffs are not entitled to get any relief. The suit was accordingly dismissed. Challenging that decree, the Plaintiffs filed A.S.No.78/99 before the Principal Sub Court, N.Paravur. The lower appellate court found that the finding of the court below regarding the pecuniary jurisdiction was not correct. It also held that the finding of the Trial Court that the suit was hit by lis pendens is not correct. So, the lower appellate court remanded the matter back to the Trial Court for fresh disposal. This appeal is filed challenging that judgment of remand.

3. Though at the time of admission, no substantial questions of law were framed, at the time of hearing, I have raised the following substantial question of law. Whether the findings regarding the pecuniary jurisdiction of the Trial Court, which was a finding based on concession made by both sides, is liable to be interfered with, in the appeal, and whether the finding of the lower appellate court that the suit is not hit by lis pendens is correct.

4. The properties originally belong to the second defendant, 3rd respondent herein. The appellant filed Annexure-A1 suit for money. The records show that initially that suit was filed as O.S.No.224 of 1982, before the Sub Court, Kochi, and the court returned the same, as per its order, dated 14.3.1983, for presentation before the proper court. Accordingly, the suit was represented before the Principal Sub Court, North Paravur. The suit was decreed on 31.8.1984 and the properties were sold in auction on 8.9.1988. The plaintiffs filed an Original Petition, on 7.3.1984, as Pauper O.P., which was subsequently converted as a suit. The parties entered into a compromise and the suit was decreed on the basis of compromise. According to the defendants, the earlier suit was one leased on a mortgage and the subsequent suit was one for money, and, as such,

the subsequent suit was hit by lis pendens. The Trial Court took a view that it was a suit on mortgage. The lower appellate court took a view that it was a suit for money. Regarding the pecuniary jurisdiction before the Trial Court, both sides agreed that the issue need not be considered.

5. I shall deal with the question of jurisdiction first. It is true that at the time of filing of the suit, the pecuniary jurisdiction of the Munsiff Court was Rs.15,000/=. Subsequently, it was raised to Rupees One Lakh. The relief sought for in the plaint was to set aside the sale conducted by the court. The parties took a view that the value shown in Ext.B1 sale certificate is the value of the property, and the suit is to be value for Rs.47,345.14 ps. That approach does not appear to be correct. Section 40 of the Court Fees and Suit Valuation Act, deals with the suit for cancellation of decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property. Ext.B1 sale certificate is a document creating title in respect of immovable property. Hence, suit is to be valued

under Section 40 of the Court Fees and Suit Valuation Act, and the court fee has to be paid for such part of the amount or value of the property.

6. When the suit came up for trial, both sides agreed that the court trying the case had pecuniary jurisdiction. The lower appellate court set aside that finding, which was entered into by the trial court, based on a concession, on a question of fact by the counsel on both sides. The lower appellate court also treated Ext.A11 as a suit filed for money. The learned counsel appearing for the appellant had pointed out that Ext.A2 produced in Ext.A11 suit was a memorandum of title deposited in favour of the plaintiff. It is also argued that Ext.A3 produced in that case was the original sale deed in favour of the defendant, and, as such, it was suit of mortgage. The lower appellate court simply took a view that Ext.A11 suit is one for money. It did not even bother to consider the evidence available on record. Since the the lower appellate court did not consider any of the material points arising for consideration, I have no other option, but to set aside the judgment of the lower appellate court, remanding the matter to Trial Court, and direct the lower appellate court to re-hear the appeal, and dispose of the same, in accordance with law.

7. In the result, this appeal is allowed. The judgment and decree passed by the lower appellate court, remanding the case to Trial Court, is hereby set aside. The lower appellate court is directed to take back A.S.No.78/1999 on its file, and dispose of the same, afresh, in accordance with law. I make it clear that I have not considered any of the points arising for consideration on its merits.

The parties shall appear before the court below on 20.7.2007.

C.M.P.No.7284/2002 in C.M.A.No.243/2002 is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

C.M.A.No. 243 OF 2002

J U D G M E N T

Dated: 21st June, 2007.